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Supreme Court, U.S.
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No. 95-991

In The

Supreme Court of the United States

October Term, 1995

CITIBANK (SOUTH DAKOTA), N.A.,

Petitioner,

v.

MARK SHERMAN,

Respondent.

On Petition For A Writ Of Certiorari
To The New Jersey Supreme Court

RESPONDENT'S MEMORANDUM OF NON-OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The sole question identified by petitioner does not adequately state the issues presented. If certiorari is granted, the Court should consider the following:

1. Did Congress intend South Dakota's legislative definition of "interest" to define the federal term "interest" in Section 30 of the National Bank Act ("NBA"), Act of June 3, 1864, ch. 106, § 30, 13 Stat. 99, 108 (codified as amended at 12 U.S.C. § 85 (1994)) ("§ 85"), and thereby displace other states' contract laws limiting the form or amount of contractual penalties for late payments on revolving credit accounts?

2. May Congress constitutionally delegate to South Dakota the power to define the federal lending term "interest" for all fifty states so as to preempt other states' contract laws?

3. As a matter of federal law, does "interest at the rate" in § 85 include contingent, sum-certain penalty charges (late fees) so as to preempt state limitations on the form or the amount of contractual penalties on revolving credit accounts?

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STATEMENT

Marc Sherman ("respondent" or "cardholder"), respectfully responds to, but does not oppose, the petition of Citibank (South Dakota), N.A. ("Citibank" or "the bank") for a writ of certiorari to review the judgment rendered in this action on November 28, 1995 by the New Jersey Supreme Court. In that decision, New Jersey's high court correctly held that "late-payment fees are not 'interest' within the intendment and purposes of the applicable federal statute." (Pet. App. 2a). The court further concluded that cardholder's state law claims do not conflict with federal law and are not preempted. *Id.* Though that decision is correct in every respect, cardholder recognizes that this case satisfies the Court's criteria for granting certiorari. Accordingly, respondent does not oppose the bank's petition for certiorari, but wishes to point out certain misstatements made in the petition.

ARGUMENT

I. THE BANK HAS MISSTATED THE ISSUES THAT WARRANT REVIEW.

As correctly noted by the bank, the opinion below directly conflicts with recent decisions rendered by the California and Colorado supreme courts. *See Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *cert. granted*, 116 S. Ct. 806 (1996); *Harris v. Chase Manhattan Bank, N.A.*, 30 Cal. App. 4th 130, 35 Cal. Rptr. 2d 733, *review granted*, 38 Cal. Rptr. 2d 346, 889 P.2d 540, *review dismissed*, 46 Cal. Rptr. 2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No.

95-951 (U.S. filed Dec. 18, 1995); *Richardson v. Citibank (South Dakota), N.A.*, 908 P.2d 532 (Colo. Dec. 18, 1995); *Copeland v. MBNA America, N.A.*, 907 P.2d 87 (Colo. Nov. 20, 1995), *petition for cert. pending*, No. 95-1056 (U.S. filed Dec. 28, 1995). All of these decisions, like the case at bar, interpret, apply and determine the preemptive scope of § 85 of the NBA.[1]

In *Smiley*, this Court granted certiorari on the three issues set forth above as the "Questions Presented." Here, the bank maintains that this case and *Smiley* conflict on the same matters, yet it seeks review of only one issue – whether "interest" includes late fees. As this Court apparently recognized in granting review in *Smiley*, the other issues raised by these cases – whether Congress intended for one state's definition of "interest" to define the federal term for all fifty states and thereby displace other states' contract laws, and whether Congress can constitutionally delegate such power to a single state[2]

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[1] The lower court's opinion also conflicts indirectly with two other decisions that interpret, apply, and determine the preemptive scope of section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d (1994) ("§ 521"), the federal statute governing the "rate" of "interest" charged by federally insured state banks. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Stoorman v. Greenwood Trust Co.*, 908 P.2d 133 (Colo. Dec. 18, 1995). Because § 521 mirrors § 85, the issues raised by the § 521 cases are virtually the same as those raised here.

[2] These other two issues arise because, if the bank's interpretation of "interest" in § 85 is correct, and the New Jersey Supreme Court's interpretation is wrong, then that necessarily would mean that South Dakota law must provide the definition

– are significant and worthy of the Court's consideration. Accordingly, if the Court grants certiorari here, respondent respectfully submits that it should do so on the same three issues as have been accepted for review in *Smiley*.

II. THE BANK HAS MISSTATED THE EXISTENCE AND SIGNIFICANCE OF OTHER CONFLICTS.

In its reasons for granting certiorari, Citibank argues that the decision below conflicts with the opinions of the Office of the Comptroller of the Currency ("OCC"). However, that agency's views are not entitled to deference because, among other things, (i) the OCC has been inconsistent on these matters;[3] (ii) § 85 does not delegate

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of the federal term. If that is the case, then South Dakota would be defining federal lending terms for the entire nation.

[3] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 466 n. 30 (1987) (an agency's interpretation which conflicts with its earlier interpretation is "entitled to considerably less deference" than a consistently held view). For example, in this case and others pending around the country, the OCC initially maintained that the federal statutory term "interest" must be defined pursuant to state law. More recently, the agency has changed its view and has conceded that federal law must define the term. In fact, the OCC has taken at least eight inconsistent positions with respect to the term "interest." *E.g.*, compare June 25, 1964 letter written by Comptroller James J. Saxon (concluding that late fees are not interest) with OCC Interpretive Letter No. 670 [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618 (Feb. 17, 1995) (opining otherwise). This inconsistency is aggravated by Congressional and other agency statements establishing that late fees and other loan penalties are not "interest" under the federal banking laws. For example, in 1980, relying on the legislative history of DIDA, S. Rep. No. 368, 96th Cong., 1st Sess. 19 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 255, the only

interpretative authority to the OCC;[4] (iii) a court may defer to an agency opinion only when a federal statute is "silent" or "ambiguous," but when a statute is silent or ambiguous with respect to preemption, the presumption against preemption should preclude a finding of preemption;[5] (iv) the OCC's interpretative letters were written by staff attorneys, not by the agency head;[6] (v) many of the

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federal banking regulator with any delegated authority to interpret the interest rate statutes, the Federal Home Loan Bank Board ("FHLBB"), adopted a federal regulation stating:

> Nothing in this section [501 of DIDA] preempts limitations in state laws on prepayment charges, attorneys' fees, *late charges* or other provisions designed to protect borrowers.

12 C.F.R. § 590.3(c) (emphasis added). That regulation, which should apply to all the interest rate sections of the same Act, practically quotes DIDA's legislative history verbatim. *See* 1980 U.S.C.C.A.N. at 255.

[4] When Congress delegates interpretative authority to the bank regulators, it does so expressly. Section 84(d) of the National Bank Act, for example, includes such a delegation. 12 U.S.C. § 84(d) (1994). In contrast, § 85 does not confer any interpretative powers on the OCC. In the absence of such delegation, the agency's interpretation cannot be given any deference. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

[5] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter"); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").

[6] The OCC has represented to this Court that informal letters by staff members are not binding, are not reliable and do not constitute final agency action. *See* Brief for the Federal Petitioners filed in *NationsBank, N.A. v. Variable Annuity Life Insurance Co.*, Nos. 93-1612, 93-1613, brief at 38, n. 19 (U.S. filed

OCC's opinions are *ad hoc* and were arrived at in connection with the current litigation solely to rationalize the result the agency already had reached;[7] and (vi) the opinions lack a sustainable rationale.[8] Because the OCC is not entitled to deference, the fact that the decision below conflicts with its views is not an appropriate basis for granting certiorari.

The bank also argues that certiorari should be granted because the lower court's opinion purportedly conflicts with jurisprudence determining that the term "interest," as ordinarily used in 1864, encompassed all charges for the use or forbearance of money, including

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July 29, 1994). The only opinion by the agency head in this case is that of Comptroller Saxon, concluding that late fees are not "interest." *See supra* note 3.

[7] *See Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442-43 (7th Cir. 1994) (en banc) (refusing to defer to administrative construction developed only after litigation was commenced), *aff'd*, 116 S. Ct. 595 (1996); *Martin v. Refrigeration School, Inc.*, 968 F.2d 3, 7-8 (9th Cir. 1992) (same).

[8] The opinions lack a sustainable rationale because, among other things, they ignore the many cases holding that single-sum contingent penalties are not interest and are illegal. *See, e.g., Meilink v. Unemployment Resources Comm'n*, 314 U.S. 564, 570 (1942) (the distinction between a "penalty as a fixed *ad valorem* amount taking no account of time, and interest which does depend on time, is persuasive"); *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) ("But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced"); *United States v. Childs*, 266 U.S. 304, 307 (1924) (a penalty is a means of punishment while interest is a means of compensation); *New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (special charges in excess of time-based interest are not allowed).

late fees. However, prior to the 1992 decision in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993), no court ever held that contingent sum-certain late fees were "interest." Moreover, when Congress enacted the NBA in 1864, this Court had already instructed on at least three occasions that "interest" did not include contract penalties such as late fees.

In *Tayloe v. Sandiford*, 20 U.S. 13, 7 Wheat. 7 (1822), the Court recognized that "[i]n general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. . . . " *Id.* at 17, 7 Wheat. at 8. Similarly, in *Lloyd v. Scott*, 29 U.S. 205, 4 Pet. 173 (1830), the Court held:

> If a party agree [sic] to pay a specific sum exceeding the lawful interest, provided he do [sic] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, *which is considered as a penalty.*

Id. at 226, 4 Pet. at 190 (emphasis added). Likewise, just one year before enactment of the NBA, the Court stated with respect to any contingent charge:

> The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious.

Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 626 (1863).

Thus, contingent sum-certain charges like credit card late fees, attorney fees, return check fees and overlimit fees, because they are neither based on the unpaid balance

nor measured by time, were not considered "interest" when the NBA was passed. Rather than contradicting this jurisprudence and lending practice dating back to the early 1800s, the lower court's decision here is completely consistent with this Court's longstanding differentiation between compensatory "interest" and punitive or deterrent contract penalties.

The bank further implies, incorrectly, that the lower court's analysis is inconsistent with *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). *Marquette* held only that a national bank may export its home state's *rate* of interest. Since South Dakota's definition of the components of interest has nothing to do with the *rate* at which interest is allowed, *Marquette* provides no basis for exporting that state's definition of "interest." The bank may still charge the unlimited rates allowed by its home state when it solicits New Jersey consumers. It may not, however, impose a separate, sum-certain penalty fee which is neither a time-based *"rate"* nor "interest." Because New Jersey law does not limit the bank's "interest rates," but only the form and amount of its contract penalties, it does not conflict with § 85.

Nor is the New Jersey decision in conflict with the most favored lender doctrine announced by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874). That doctrine permits a national bank to charge the highest statutory "interest rate" available to any lender within the bank's home state. Here, the lower court's decision clearly leaves the doctrine intact. Under the court's interpretation, when any South Dakota lender solicits business in New Jersey, that lender, like every other company soliciting business in the state, is bound

by New Jersey's contract and consumer protection laws regulating sum-certain penalties. Similarly, when making intrastate loans, all the banks remain at least on equal footing because they can charge both the same interest and the same late fees. Furthermore, if any South Dakota lender is ever entitled to charge a higher interest rate than other lenders in the state, Citibank, by virtue of its most favored lender status, would also be entitled to charge that higher *rate*. Thus, contrary to the bank's assertion, the lower court's decision has no impact on the most favored lender doctrine.

In summary, though the decision below rejects the recent opinions of two other state supreme courts and a federal court of appeals in similar cases, the other so-called "conflicts" identified by the bank either do not exist or do not matter. In light of *Tayloe*, *Lloyd*, *Spain*, *Marquette* and *Tiffany*, the New Jersey Supreme Court's decision does not contradict this Court's pronouncements. The fact that the decision conflicts with the current, inconsistent and unauthorized views of the OCC is immaterial since those views are not afforded any deference anyway. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (where federal statute provides private right of action and federal remedy, Congress has expressly established the judiciary and not a federal agency as the interpretive authority for the statute's preemptive scope). Thus, the appropriate basis for granting certiorari here is the conflict among the state supreme courts (and the First Circuit) as described in part I of this memorandum.

CONCLUSION

Even though the lower court's decision is correct in every respect, cardholder recognizes that, given the conflict among the state supreme courts and the First Circuit in these matters, this case satisfies the Court's criteria for granting certiorari. Accordingly, respondent does not oppose the bank's petition, but respectfully submits that if the Court grants certiorari here, it should do so on the same three issues as are now before the Court in *Smiley*.

Respectfully submitted,

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